C. THE DECISION OF THE COURT OF APPEALS

The court of appeals found that the purpose of the strike was to induce the Company to hold a consent election, that this objective was protected by Section 7 of the Act, and that the employees were thus engaged in a lawful economic strike (Pet. App. 23–24).[6] The court sustained the Board's finding that the Company had discharged Manuel and Robert Vasquez and Richard Dicus for striking and refusing to cross the picket line before they had been permanently replaced, and had thereby violated Section 8(a)(3) and (1) of the Act (Pet. App. 25). The court also found that, although Casillas did not receive a telegram, he was discharged for the same reason and under the same circumstances, and thus his discharge similarly violated Section 8(a)(3) and (1) (Pet. App. 22). The court, however, declined to enforce the reinstatement provisions of the Board's order.

In the court's view, the reinstatement provisions were dependent on a finding that the four employees became unfair labor practice strikers at the moment they were discharged. The court rejected that conclusion. It stated (Pet. App. 27):

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pany to bargain with the Union upon request (Pet. App. 41–42, 43). The court below did not reach this aspect of the case (Pet. App. 31). Accordingly, if this Court reverses the judgment below with respect to the reinstatement rights of the affected employees, the case must be remanded to the court of appeals for a determination of the propriety of the bargaining order.

[6] The court found it unnecessary to reach the question whether the strike would have been protected had its purpose been "to gain immediate recognition for the Union, rather than merely to force a consent election" (Pet. App. 24, n. 4).

> * * * The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been discharged would eliminate the distinction between the economic-striker-reinstatement rule [*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333] and the unfair-labor-practice-striker-reinstatement rule [*Mastro Plastics* v. *National Labor Relations Board*, 350 U.S. 270] in cases like this one. * * * [Footnote omitted.]

Accordingly, the court held that the four employees were economic strikers when discharged and would not be entitled to reinstatement if the Company could show "legitimate and substantial business justifications" for refusing to reinstate them (Pet. App. 28).

The court therefore remanded the case to the Board for further findings on the Company's reasons for failing to reinstate the four strikers (Pet. App. 28–29). In addition, the court found that the circumstances surrounding the refusal to reinstate Casillas were ambiguous and directed the Board to clarify that matter (Pet. App. 29–31).[7]

[7] The court noted that Casillas, unlike the other three employees, was a "casual" worker, who worked for the Company

SUMMARY OF ARGUMENT

Decisions under the Act have distinguished between employees who strike over economic objectives and those who strike to protest the unfair labor practices of an employer. The former are entitled to reinstatement unless the employer can show "legitimate and substantial business justifications" for the failure to do so, such as the continued presence of permanent replacements in the strikers' jobs. The latter, however, are entitled to reinstatement unconditionally, even though it may be necessary as a result to discharge permanent replacements hired during the strike. It is further settled that the discharge of economic strikers for strike absences before they have been permanently replaced violates Section 8(a)(3) and (1) of the Act. For such action constitutes discrimination against, and interference with, protected strike activity.

Here, the court of appeals upheld the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging four employees who were engaged in a protected economic strike before they were permanently replaced. However, the court refused to enforce the traditional reinstatement remedy ordered by the Board, holding that the unlawfully discharged employees were entitled only to the conditional reinstatement rights of economic strikers. The court erred on two grounds.

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only when summoned for a specific job. The court concluded that it was unclear whether McEwan decline to restore Casillas to the availability list or, if he had been restored, whether there was work for which he should have been called (Pet. App. 29–30).

First, wholly apart from whether the four dischargees became unfair labor practice strikers, the Company, because of its action in unlawfully discharging them, had an unconditional obligation to reinstate them. As this Court has noted, "[r]einstatement is the conventional correction for discriminatory discharges." *Phelps Dodge Corp* v. *National Labor Relations Board,* 313 U.S. 177, 187. Employees who are discriminatorily discharged while on strike, no less than working employees who are unlawfully discharged, can be made whole only if they are offered immediate reinstatement to their former jobs.

Second, contrary to the court below, the Board properly found that the four dischargees became unfair labor practice strikers. Thus, since the four employees continued to strike after their unlawful discharge, it is reasonable to conclude that they were then protesting not only the original grievance but also the subsequent unfair labor practice against them. Consequently, they became entitled to unconditional reinstatement for that reason alone.

The ruling of the court below would greatly enlarge the risks to which economic strikers have heretofore been subject. Moreover, it results in the anomaly that strikers who are unlawfully discharged are accorded less protection under the Act than are fellow strikers who are later discharged for protesting the initial discharges.

There is no merit to the Company's contention that the strike was unprotected by Section 7 of the Act, and therefore the Company could discharge the employees

with impunity. Substantial evidence supports the finding of the Board and court below that the strike was for the purpose of securing a consent election—clearly a protected objective. But even if the strike's objective were solely to gain immediate recognition of the Union, as the Company contends, the strike would not be unlawful or against public policy.

ARGUMENT

I

ECONOMIC STRIKERS WHO ARE DISCHARGED FOR STRIKING BEFORE THEY HAVE BEEN PERMANENTLY REPLACED HAVE AN UNCONDITIONAL RIGHT TO REINSTATEMENT

Decisions under the National Labor Relations Act have consistently distinguished between employees who strike over economic objectives and those who strike to protest the unfair labor practices of an employer. The former are entitled to reinstatement unless the employer can show "legitimate and substantial business justifications" for the failure to do so, such as the continued presence of permanent replacements in the strikers' jobs. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–347; *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378. The latter, however, are entitled to reinstatement unconditionally, even though it may be necessary as a result to discharge permanent replacements hired during the strike. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278; *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927–928 (C.A. 2).

The reason for the distinction is that, where employees have elected to strike for economic reasons, the employer, while he cannot discriminate against them for striking, has a legitimate interest in seeking to operate his business notwithstanding the strike, even to the extent of obtaining permanent replacements for the strikers. But, where the employees are striking because of the employer's unfair labor practices, there is no countervailing legitimate employer interest; unless the strikers are reinstated unconditionally at the end of the strike, they would be penalized for having taken action to protect themselves against the employer's wrongdoing.

It is further settled that the discharge of economic strikers for strike absences before they have been permanently replaced violates Section 8(a)(3) and (1) of the Act. For such action constitutes discrimination against, and interference with, strike activity which is not counterbalanced by any valid business justification. See *National Labor Relations Board* v. *United States Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818, enforcing, 96 NLRB 1108, 1112; *National Labor Relations Board* v. *Comfort, Inc.*, 365 F. 2d 867, 874 (C.A. 8), enforcing, 152 NLRB 1074, 1077–1079; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9), enforcing, 88 NLRB 1262, 1268; *National Labor Relations Board* v. *Buzza-Cardozo*, 205 F. 2d 889, 890–891 (C.A. 9), enforcing, 97 NLRB 1342, 1344; *National Labor Relations Board* v. *Cowles Publishing Co.*, 214 F. 2d 708, 710–711 (C.A. 9), certi-

orari denied, 348 U.S. 876, enforcing, 106 NLRB 801, 802–803.

The court below in this case, though finding that Richard Dicus, Manuel and Robert Vasquez, and Salvidor Casillas were discharged while engaged in a lawful economic strike and before they had been permanently replaced, and that thus their discharges violated Section 8(a)(3) and (1), nonetheless concluded that they were entitled to no more than the qualified reinstatement rights of economic strikers. That is, they could be denied reinstatement if the Company had a "legitimate and substantial business justifications" for doing so (Pet. App. 28). In the court's view, the four economic strikers would acquire an unconditional right to reinstatement only if it could be shown that their unlawful discharges converted them into unfair labor practice strikers. The court concluded that no such showing could be made here, since at the time of their discharges they were protesting only the original grievance (Pet. App. 27). This reasoning is erroneous on two grounds.

First, whether or not the four discharged employees became unfair labor practice strikers, they were entitled to unconditional reinstatement solely on account of the fact that their discharges were unlawful.[8] As this Court has noted, "[r]einstatement is the conventional correction for discriminatory discharges"; "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have

[8] Under Section 2(3) of the Act, 29 U.S.C. 152(3), a wrongfully discharged employee retains his status as an "employee" entitled to the protection of the Act.

obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 187, 194; see also Section 10(c) of the Act, 29 U.S.C. 160(c). When an employee is unlawfully discharged while on strike and before he has been replaced, he is wrongfully deprived of a job to which, at the time of the discharge, he is otherwise entitled to return. A reasonable means of eradicating the effects of this unlawful action is to require the employer to offer the striker reinstatement to his former job whether or not a replacement was hired after the discharge. Accordingly, the courts of appeals, including the court below, have consistently enforced Board orders requiring such offers of reinstatement to employees unlawfully discharged while participating in an economic strike. See cases cited *supra,* pp. 13–14. See also *Bonnar-Vawter, Inc.* v. *National Labor Relations Board,* 289 F. 2d 133 (C.A. 1).[9]

Second, the Board properly found that the four dischargees became unfair labor practice strikers. It is true, as the court below noted, that at the time of their

[9] Thus, even if the four strikers in this case had ceased striking at the moment of their discharge so that they never became unfair labor practice strikers, they would nevertheless have been entitled to offers of reinstatement. However, where employees continue striking after their unlawful discharge, the Board does not award backpay from the date of their discharge, but only from the date that they may have indicated a desire to abandon the strike. In the Board's view, absent such indication, it cannot be determined whether the loss of wages is attributable to the discharges or to the strike. See *Sea-Way Distributing, Inc.*, 143 NLRB 460; *Buzza-Cardozo*, 97 NLRB 1342, 1344–1345, enforced, 205 F. 2d 889 (C.A. 9).

discharges the four employees were protesting only the original grievance (Pet. App. 27). However, since the employees continued to strike after their unlawful discharge, it is reasonable to conclude that they were then protesting not only the original grievance but also the subsequent unfair labor practice against them. Certainly, they were as likely to be protesting that unfair labor practice as were any strikers subsequently discharged, whom the court concedes "might legitimately be considered unfair labor practice strikers" (*ibid.*). Accordingly, by continuing to strike after their unlawful discharge, the four strikers were entitled to unconditional reinstatement not only because their discharge was unlawful, but for the additional reason that they became unfair labor practice strikers. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 928, n. 8 (C.A. 2); *National Labor Relations Board* v. *Frick Co.*, 397 F. 2d 956, 964 (C.A. 3); *General Teamsters Local Union No. 992* v. *National Labor Relations Board*, 427 F. 2d 582, 587 (C.A.D.C.).

Contrary to the misgivings of the court below, a holding that the four dischargees had become unfair labor practice strikers would not eliminate the distinction between the reinstatement rights of economic strikers and the reinstatement rights of unfair labor practice strikers. Nor would it mean that discharged economic strikers automatically become unfair labor practice strikers when an economic strike is thereafter converted into an unfair labor practice strike (Pet. App. 27, and n. 5). The strikers here were not dis-

charged for cause, but in violation of Section 8(a)(3) and (1) of the Act. Only in these circumstances does it necessarily follow that, by continuing to strike, the dischargees have added their own grievances to the original economic basis for a strike and thus have become unfair labor practice strikers.[10]

The ruling of the court of appeals would greatly enlarge the risks to which economic strikers have heretofore been subject. Under the court's holding, once employees go out on strike, their employer can discriminatorily discharge union leaders or others whom he disfavors and avoid an obligation to reinstate them by later establishing that, after the discharge and before the employees offered to return to work, he had hired permanent replacements for them. Under settled law, the employer could not similarly minimize his reinstatement obligation with respect to employees unlawfully discharged while working; to allow him to do so during an economic strike would inevitably limit

[10] *National Labor Relations Board* v. *James Thompson & Co.*, 208 F. 2d 743 (C.A. 2), cited by the court below (Pet. App. 28, n. 5), is distinguishable. There, the employer did not unlawfully discharge economic strikers. The question, rather, was whether an economic strike over the employer's failure to recognize the union was "prolonged," and thereby converted into an unfair labor practice strike, by the employer's action in promising and granting a wage increase in violation of Section 8(a)(1) of the Act. The court merely held that it was unlikely that these violations of Section 8(a)(1) would have caused the employees to remain out on strike had the employer "changed its position" on "the grievance on which the employees went out", 208 F. 2d at 749. Here, on the other hand, it is clear that the four dischargees were ready to come back to work, but were prevented from doing so because they had been unlawfully discharged (see *supra*, p. 6).

the employees' willingness to engage in such protected activity. Moreover, the court's holding results in the anomaly that strikers who are unlawfully discharged are accorded less protection under the Act than are fellow strikers who are later discharged for protesting the initial discharges. Congress could hardly have intended such an irrational result.

II

THE STRIKE CONSTITUTED ACTIVITY PROTECTED BY SECTION 7 OF THE ACT

In its answer to our petition for a writ of certiorari in this case, the Company contended that the strike did not constitute activity protected by Section 7 of the Act, since a petition to determine the Union's representative status was pending before the Board at the time of the strike (Answer, pp. 2, 8–15). As we pointed out in our reply memorandum to the answer, the question whether the strike constituted protected activity is not properly before this Court, since the court below sustained the Board's finding that the strike was protected and the Company did not timely file a petition or cross-petition for certiorari in this Court. In any event, there is no merit to the Company's contention.

As we have noted (*supra*, pp. 6–7), the Board found that the employees had engaged in a strike to bring pressure on the Company to agree to a consent election (Pet. App. 39). The court of appeals sustained the finding and agreed with the Board that, in view of such an object, the strike was lawful notwithstanding

the fact that a representation petition was pending before the Board (Pet. App. 24). See *New Orleans Roosevelt Corp.*, 132 NLRB 248; *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 869.

The record supports the finding of the Board that the picketing and the strike at the Company's warehouse started in order to force a consent election.[11] As the court of appeals pointed out: "Fabrication or not, it is undisputed that [Union agent] Sanders told the men assembled at the Union meeting that the Company had consented to an election and had then reneged. Nothing in the record suggests that the men believed otherwise, or had reason to believe otherwise" (Pet. App. 23). And, upon receiving Sanders' information, the employees concluded: "[W]ell, they don't want to consent to an election. We are going to go on strike * * *" (A. 27). Although other issues may later have arisen during the lengthy strike,[12] its

[11] The Company conceded in its brief before the court of appeals that, at least at its inception (when the four discharges occurred), the purpose of the strike was to force a consent election. The Company stated (Br. 32) that, "[v]iewing the totality of the evidence, it appears beyond question that the Union caused the picketing in the first place to force a consent election; that as the picketing matured the object became not merely recognition, but agreement to a standard industry-type contract; and that no conduct short of the signing of such a contract would have ended the strike."

[12] On March 28, 1968, Manuel Vasquez and Richard Dicus approached President McEwan to see if a settlement could be reached which would end the strike (A. 32–33). McEwan said that he would have to consult his attorney (A. 33–34). Later the same day, Vasquez and Dicus saw Arley Moore, a representative of another company, and asked if Moore could talk with some of the employers in the area in order to find a solu-

avowed objective when the employees were discharged on the second day was to secure a consent election; with such an objective, the strike was lawful.

Finally, even if the Union's objective was to secure recognition despite the pendency of an election petition, the Board correctly concluded as an alternative basis for upholding the legality of the strike that the Union's activity was protected by Section 7 (Pet. App. 39–40).[13] Since a Board certification is not the only means of establishing representative status, it is settled that, where, as here, a majority of the employees have signed authorization cards for the union, a strike and picketing for recognition are lawful. *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 75; *Philanz Oldsmobile, Inc., supra*, 137 NLRB at 868–869. Although Congress has regulated such picketing under certain circumstances in Section 8(b)(7) of the Act, 29 U.S.C. 158(b)(7), recognitional picketing is not proscribed where a petition for a representation election has been filed. To the contrary, under Section 8(b)(7)(C),[14] such picketing cannot be

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tion to the strike. Moore agreed to do so (A. 32–33). Subsequently, Dicus and Vasquez again conferred with McEwan to see if he would sign a contract and thereby settle the continuing strike, but no agreement was reached (A. 34–35).

[13] The court of appeals did not pass on this alternate ground for sustaining the strike (see Pet. App. 24, n. 4).

[14] This Section provides, *inter alia*, that:

"It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(7) to picket or cause to be picketed, * * * any employer where an object thereof is forcing or requiring an employer to

conducted for more than 30 days *unless* the union has filed a representation petition. See *Leather Goods Union* v. *Compton*, 292 F. 2d 313, 317 (C.A. 1); *Dayton Typographical Union* v. *National Labor Relations Board*, 326 F. 2d 634, 636 (C.A.D.C.). Accordingly, by coupling its picketing for recognition with the filing of a representation petition, the Union merely complied with the statutory requirements for preserving the legality of the picketing.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed insofar as it denies enforcement of the provisions of the Board's order (Pet. App. 46) requiring that Richard Dicus, Manuel and

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recognize or bargain with a labor organization as the representative of his employees * * *

* * * * *

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: * * *."

Robert Vasquez, and Salvidor Casillas be reinstated with back pay.[15]

Respectfully submitted.

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National Labor Relations Board.

MAY 1972.

[15] The Board noted in its opinion (Pet. App. 42) that the record does not clearly establish whether Casillas was a part-time or full-time employee and, accordingly, left resolution of his status and entitlement to back pay benefits to the compliance stage of the proceeding. While the Board did find that Casillas made an unconditional application for reinstatement in November 1967 (Pet. App. 37, n. 5), his entitlement to back pay after that time, if in fact he was a part-time employee, would depend upon a determination that there was work for which he should have been called.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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October Term, 1971

No. 71-895

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL VAN LINES.

ON [redacted] A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus,* in support of the position of the National Labor Relations Board is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

1. In form, the decision below appears to respect the well-settled doctrine that the discriminatory discharge of an employee engaged in a lawful strike violates §§ 8(a)(1)&(3)

of the National Labor Relations Act; in substance, however, the decision saps that doctrine's vitality by the severe limitation it imposes on the National Labor Relations Board's remedial power to cure such violations.

The Court of Appeals "affirmed" the Board's finding that the Employer committed a core violation of the Act: viz., the discriminatory discharge of four striking employees "in order to punish [them] for taking part in the strike." Pet. App. 25. See also, e.g., *NLRB* v. *Remington Rand, Inc.*, 130 F.2d 919, 927-928 (C.A. 2); *NLRB* v. *United States Cold Storage Co.*, 203 F.2d 924, 933 (C.A. 5), *cert. denied*, 346 U.S. 818; *NLRB* v. *Comfort, Inc.*, 365 F.2d 874 (C.A. 8); *NLRB* v. *Globe Wireless, Ltd.*, 193 F.2d 748, 750 (C.A. 9). The Board, in conformity with its established practice approved in the decisions just cited, concluded that the appropriate remedy for this unfair labor practice was reinstatement with back pay from the point the discriminatees offered to return to work. Pet. App. 42. The court below, however, disagreed. On the remedial issue it held that striker-discriminatees are entitled to reinstatement only where the company does not have some "legitimate and substantial business justification," for not reinstating them. Pet. App. 28.

This holding is an invitation to employers to rid themselves of union activists through precisely the conduct §§8(a)(1)&(3) were intended to forbid. It permits an employer to single out strike leaders for discharge, secure in the knowledge that if he then hires replacements for the discriminatees the sole remedy for his unfair labor practice will be the slap on the wrist of a "cease and desist" order; an order that does nothing to repair the situation of the

discriminatees, and which for that reason provides no reassurance to other employees who are contemplating the exercise of their right to engage in concerted activities.

(a) The Act is designed to promote "collective bargaining with the right to strike at its core." *Bus Employees* v. *Missouri*, 374 U.S. 74, 82. The right to strike is central to the statutory scheme because "a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221. For the right to utilize "economic force [is] a 'prime motive power for agreements in free collective bargaining'." *NLRB* v. *Insurance Agents International*, 361 U.S. 477, 489. Thus "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." *Id.* at 495. The legitimacy of the use of the strike weapon flows from the fact that "it was recognized from the beginning that agreement might in some cases be impossible [in labor-management disputes] and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103-104. Since our system of free collective bargaining does not countenance "government control of the results of negotiation" (*NLRB* v. *Insurance Agents International*, 361 U.S. 477, 490), and does not provide for "compulsory arbitration, . . . the strike has been the ultimate sanction of the union" (*Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244). In the final analysis the strike, and allied economic weapons, are all that em-

ployees possess to improve their working conditions; employers are under no statutory duty to treat their workers fairly and "the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak." *H. K. Porter*, 397 U.S. at 109.

Because of its central role Congress has shown "repeated solicitude for the right to strike." *Erie Resistor*, 373 U.S. at 234. As Mr. Justice White explained therein (*Id.* at 233, footnotes omitted):

> "Section 7 guarantees and § 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, HR Rep No. 245, 80th Cong, 1st Sess, 26, include the right to strike. Under § 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage 'membership in any labor organization,' which includes discouraging participation in concerted activities, Radio Officers Union, etc. v. NLRB, 347 U.S. 17, 39, 40, such as a legitimate strike. NLRB v. Wheeling Pipe Line, Inc. (C.A. 8) 229 F.2d 391; Republic Steel Corp. v. NLRB (C.A. 3) 114 F.2d 820. Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress, HR Conf Rep No. 510, 80th Cong, 1st Sess. 59, and § 2(3) preserves to strikers their unfilled positions and status as employees during the pendency of a strike. S Rep No. 573, 74th Cong, 1st Sess 6."

In short, under § 2(3) "strikers remain employees for the purpose of the Act and [are] protected against the unfair labor practices denounced by it." *NLRB* v. *Mackay Radio*

& Telegraph Co., 304 U.S. 333, 345. Congress's purpose in providing this protection was to grant striking employees an "immunity" against improper discharges which "would or might have a deterrent effect on other employees." *NLRB* v. *Burnup & Sims*, 379 U.S. 21, 23. As the Fourth Circuit explained in *NLRB* v. *Industrial Cotton Mills*, 208 F.2d 87, 91 (C.A. 4), *cert. denied*, 347 U.S. 935, which was followed in *Burnup & Sims*, 379 U.S. at 22:

> "Congress has, in no uncertain terms, very carefully safeguarded the exercise by employees of concerted activities and has expressly recognized their right to strike . . . [This] statutory protection . . . is a firm and clear guarantee . . .
>
> The right to reinstatement granted to a blameless unreplaced striker [and to a striker-discriminatee or unfair labor practice striker whether replaced or not] is designed to set the limit of the risk he runs by striking. That limit . . . should not be unduly extended."

(b) As already noted (pp. 2-5 *supra*) the decision below invalidates the "clear and firm guarantee" (*Industrial Cotton Mills*, 208 F.2d at 91) of "immunity" (*Burnup & Sims*, 379 U.S. at 23) from discriminatory discharges that Congress provided to strikers. It grants employers leave to commit §§ 8(a)(1)&(3) violations free of the obligation to reinstate the striker-discriminatees. This, of course, greatly enlarges the risk Congress attached to participation in protected concerted activity. The Court of Appeals reached this result on the ground that requiring reinstatement here "would eliminate the distinction between the economic-striker-reinstatement rule (*Mackay Radio & Telegraph*) and the unfair-labor-practice-striker-reinstatement rule (*Mastro Plastics* [v. *NLRB*, 350 U.S. 270, 278]) in